LITUS JAU & ANOR

v.

BOUSTEAD PELITA TINJAR SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
RAMLY ALI JCA
ALIZATUL KHAIR OSMAN JCA
[CIVIL APPEAL NO: Q-01-305-07-2012]
25 SEPTEMBER 2013

CIVIL PROCEDURE: *Action - Commencement - Native customary rights ('NCR') - Dispute as to issuance of provisional lease to first defendant - Alienation and issuance of provisional lease over part of NCR land by Superintendent of Lands and Surveys Miri Division and State Government of Sarawak - Action commenced by way of writ - Whether action should have been commenced by way of judicial review - Whether private law element more dominant than public law element attached to NCR claims*

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land - Action - Commencement - Alienation and issuance of provisional lease over part of Native Customary Rights ('NCR') land by Superintendent of Lands and Surveys Miri Division and State Government of Sarawak - Action commenced by way of writ - Whether action should have been commenced by way of judicial review - Whether private law element more dominant than public law element attached to NCR claims*

LIMITATION: *Public Authorities Protection Act 1948 - Whether action time-barred - Native customary rights - Dispute as to issuance of provisional lease to first defendant - Alienation and issuance of provisional lease over part of NCR land by Superintendent of Lands and Surveys Miri Division and State Government of Sarawak - Suit brought nearly 20 years after issuance of provisional lease - Whether beyond statutory timeline permitted - Continuing injury or damage - Whether plaintiffs took any action to protect their purported rights - Whether action caught by limitation under s. 2(a)*

LIMITATION: *Commencement of action - When action commenced - Native customary rights - Dispute as to issuance of provisional lease to first defendant - Alienation and issuance of provisional lease over part of*

NCR land by Superintendent of Lands and Surveys Miri Division and State Government of Sarawak - Action instituted nearly 18 years later - Whether action time-barred under Sarawak Limitation Ordinance

The appellants ('plaintiffs') were Berawan by race and natives of Sarawak. It was claimed that they had acquired Native Customary Rights ('NCR') over certain parcels of land. The complaint was that the Superintendent of Lands and Surveys Miri Division ('the second defendant') and the State Government of Sarawak ('the third defendant') had alienated and issued a provisional lease over a part of their NCR land to the first defendant without the plaintiffs' knowledge. In the High Court, the defendants filed an application to strike out the plaintiffs' action and thereafter, filed an application under O. 14A of the Rules of the High Court 1980 ('RHC') to decide on certain questions of law and in the event the said questions were determined in favour of the defendants, the plaintiffs' action would be struck out under O. 18 r. 19 of the RHC. The court decided, *inter alia*, that (i) the plaintiffs should have proceeded by way of judicial review under O. 53 of the RHC instead of a writ action; and (ii) the action filed in 2011 was barred due to the Sarawak Limitation Ordinance ('SLO') and s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA'). The plaintiffs' action was then struck out. Aggrieved by the said decision, the plaintiffs appealed and the issues that arose for consideration were (i) whether the action should have been commenced by way of judicial review; and (ii) whether the plaintiffs' claim was caught by limitation. The plaintiffs argued, *inter alia*, that so long as the provisional lease remained valid, there was always a threat to the plaintiffs' NCR and their rights thereby entitling them to a valid cause of action. In short, the plaintiffs' stance was that the 36 months' limitation period for continuance of injury under s. 2 of the PAPA would only run when the said provisional lease became invalid being a continuing injury or damage upon the NCR and rights of the plaintiffs.

Held (dismissing appeal)

Per Raus Sharif PCA delivering the judgment of the court:

(1) NCR-related claims is not solely and/or exclusively within the domain of public law. It is a mixture of public and private law. Given that the private law element in NCR-related claims is so great in that it affects the very livelihood of the natives of the state of Sarawak, the private law element is more

dominant than the public law element attached to NCR claims. The peculiarity and distinct features of the NCR claims make it an exception to the general principle propounded in *O'Reilly v. Mackman*. Thus, the plaintiffs herein were right in filing this action by way of writ and not by way of judicial review. (para 18)

(2) The plaintiffs' cause of action against the second and third defendants accrued after the issuance of the provisional lease in 1992. Given this scenario and premised on the 36 months limitation provided under s. 2(a) of the PAPA, there can be no doubt that the plaintiffs' action against the said defendants was time-barred as the suit was brought nearly 20 years after the issuance of the provisional lease. This was beyond the statutory timeline permitted. (para 33)

(3) The plaintiffs took nearly 20 years to bring this action. This clearly showed that if they had any rights indeed, which had been infringed, and as a result thereof they had continued to suffer, an action should have been commenced promptly. However, the facts of this case did not support the existence of a continuing injury or damage as whatever injury was caused by a single act of the second defendant in issuing the provisional lease some 20 years ago. During this time, the first defendant managed to complete their oil palm plantation and there were two compulsory land acquisitions on two different occasions. However, the plaintiffs did not challenge these acquisitions. As such, the irresistible conclusion that could be drawn from this factual scenario was that whatever rights the plaintiffs had were defeated as they had slept over it or acquiesced to the infringement of their rights. Since the plaintiffs did not take any action to protect their purported rights, it raised serious doubts on the *bona fides* of their NCR claim. Thus, the plaintiffs' claim against the second and third defendants was caught by limitation under s. 2(a) of the PAPA. (paras 34)

(4) As for the first defendant, the limitation period provided for under item 97 of the SLO was six years. The plaintiffs' action which was instituted in 2011, *ie*, nearly 18 years after the first defendant had finished the oil palm plantation, was clearly out of time. Hence, the claim instituted by the plaintiffs was time-barred under the SLO. Further, applying the other items

under the SLO which was consonant with the issue of limitation and which was applicable to the instant case, the plaintiffs' action against the first defendant was statute-barred. (paras 35 & 37)

(5) The learned judge was correct in striking out the writ of summons filed against the defendants by reason that the plaintiffs' claim against them was statute-barred under s. 2(a) of the PAPA and Item 97 of the SLO. (para 38)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu ('plaintif') berketurunan Berawan dan anak negeri Sarawak. Adalah didakwa bahawa mereka telah memperolehi hak adat anak negeri ('NCR') atas beberapa bidang tanah. Aduannya adalah bahawa Penguasa Tanah dan Ukur Bahagian Miri ('defendan kedua') dan kerajaan negeri Sarawak ('defendan ketiga') telah mengasingkan dan mengeluarkan pajakan sementara atas sebahagian tanah NCR tersebut kepada defendan pertama tanpa pengetahuan plaintif-plaintif. Di Mahkamah Tinggi, defendan telah memfailkan permohonan untuk membatalkan tindakan plaintif-plaintif dan kemudian, telah memfailkan satu permohonan di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menentukan beberapa persoalan undang-undang dan jika persoalan tersebut diputuskan berpihak kepada defendan, maka tuntutan plaintif akan dibatalkan di bawah A. 18 k. 19 KMT. Mahkamah memutuskan, antara lain, bahawa (i) pihak plaintif sepatutnya meneruskan melalui semakan kehakiman di bawah A. 53 KMT dan bukan melalui tindakan writ; dan (ii) tindakan yang difailkan pada tahun 2011 telah dihadkan oleh masa disebabkan oleh Ordinan Had Masa Sarawak ('SLO') dan s. 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('PAPA'). Oleh itu, tindakan pihak plaintif dibatalkan. Terkilan dengan keputusan tersebut, plaintif-plaintif merayu dan isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada tindakan sepatutnya dimulakan melalui semakan kehakiman; dan (ii) sama ada tuntutan pihak plaintif dihadkan oleh masa. Plaintif-plaintif menghujahkan, antara lain, bahawa selagi pajakan sementara masih sah, terdapat penggugatan terhadap NCR plaintif dan hak mereka dengan itu melayakkan mereka untuk suatu kausa tindakan yang sah. Secara ringkasnya, hujahan plaintif-plaintif adalah bahawa tempoh had masa 36 bulan bagi kecederaan berterusan di bawah s. 2 PAPA hanya akan bermula apabila

pajakan sementara menjadi tidak sah kerana ia merupakan kecederaan atau kerosakan berterusan terhadap NCR dan hak plaintif-plaintif.

Diputuskan (menolak rayuan)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Tuntutan berkenaan NCR bukan sahaja dan/atau secara eksklusif merangkumi domain undang-undang awam. Ia adalah gabungan undang-undang awam dan persendirian. Memandangkan unsur undang-undang awam berkenaan tuntutan berhubung NCR boleh memberi kesan kepada kehidupan anak negeri Sarawak, undang-undang persendirian adalah lebih dominan berbanding unsur undang-undang awam berhubung tuntutan NCR. Ciri-ciri aneh dan berlainan tuntutan NCR membuatnya suatu pengecualian kepada prinsip am seperti yang diperuntukkan dalam *O'Reilly v. Mackman*. Oleh itu, plaintif-plaintif bertindak dengan betul dalam memfailkan tindakan ini melalui writ dan bukannya melalui semakan kehakiman.

(2) Kausa tindakan plaintif-plaintif terhadap defendan kedua dan ketiga bermula selepas pengeluaran pajakan sementara pada tahun 1992. Melihatkan pada keadaan ini dan berdasarkan had masa 36 bulan seperti yang diperuntukkan di bawah s. 2(a) PAPA, tiada keraguan bahawa tindakan plaintif-plaintif terhadap defendan-defendan dihadkan oleh masa memandangkan guaman dibawa 20 tahun selepas pengeluaran pajakan sementara. Ini melebihi had masa statutori yang dibenarkan.

(3) Plaintif-plaintif telah mengambil hampir 20 tahun untuk membawa tindakan ini. Ini menunjukkan bahawa jika mereka mempunyai sebarang hak yang telah dilanggar dan sebagai akibatnya telah mengalami kesusahan, suatu tindakan sepatutnya dimulakan dengan segera. Walau bagaimanapun, fakta kes ini tidak menyokong kewujudan kecederaan atau kerosakan berterusan memandangkan apa-apa kecederaan adalah disebabkan oleh tindakan defendan kedua dalam mengeluarkan pajakan sementara 20 tahun lepas. Pada masa ini, defendan pertama telah pun menyiapkan ladang kelapa sawit dan terdapat dua pengambilan secara paksa pada dua masa berlainan. Walau bagaimanapun, plaintif-plaintif tidak mencabar pengambilan-pengambilan ini. Oleh itu, kesimpulan

yang tidak boleh disangkal daripada keadaan ini adalah bahawa sebarang hak yang dimiliki oleh plaintif-plaintif telah dikalahkan memandangkan mereka tidak membuat apa-apa atau bersetuju kepada perlanggaran hak mereka. Memandangkan pihak plaintif tidak mengambil sebarang tindakan untuk melindungi hak mereka, ia membangkitkan keraguan serius terhadap *bona fide* tuntutan NCR mereka. Maka, tuntutan plaintif-plaintif terhadap defendan kedua dan ketiga dihalang oleh had masa di bawah s. 2(a) PAPA.

(4) Bagi defendan pertama, tempoh had masa yang diperuntukkan di bawah item 97 SLO adalah enam tahun. Tindakan plaintif-plaintif yang dimulakan pada tahun 2011, iaitu kira-kira 18 tahun selepas defendan pertama menyiapkan ladang kelapa sawit, jelas di luar jangka masa. Oleh itu, tuntutan yang dimulakan oleh pihak plaintif dihalang oleh had masa di bawah SLO. Tambahan, menggunapakai item-item lain di bawah SLO yang sejajar dengan isu had masa dan boleh dipakai dalam kes ini, tindakan plaintif-plaintif terhadap defendan pertama adalah terhalang oleh statut.

(5) Yang arif hakim tepat dalam membatalkan writ saman yang difailkan terhadap defendan-defendan atas alasan bahawa tuntutan plaintif-plaintif terhadap mereka terhalang oleh statut di bawah s. 2(a) PAPA dan item 97 SLO.

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Director of Forest Sarawak & Anor v. Balare Jabu & Ors And Another Appeal [2012] 7 CLJ 685 FC ***(refd)***

Jalang Paran & Anor v. Government of the State of Sarawak & Anor [2011] 3 CLJ 469 CA ***(refd)***

Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383 HC ***(refd)***

O'Reilly v. Mackman [1982] 2 All ER 1124 ***(refd)***

Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor [2004] 4 CLJ 775 HC ***(refd)***

Teh Guan Teik v. Inspector General of Police & Anor [1998] 3 CLJ 153 FC ***(refd)***

Legislation referred to:
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 14A, O. 18 r. 19, O. 53
Sarawak Limitation Ordinance (Chap 49), item 92, 97, 110, 112

For the appellants - Baru Bian; M/s Baru Bian & Solicitors
For the 1st respondent - Sim Hui Chuang (Lim Lip Sze with him); M/s Reddi & Co
For the 2nd & 3rd respondents - JC Fong (Lonie Anak Pinda with him); State AG's Chambers

[Appeal from High Court, Miri; Suit No: MR-21-9-2011]

Reported by Kumitha Abd Majid

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This is an appeal against the decision of the learned High Court Judge sitting at Miri, given on 31 May 2012, in striking out the appellants' suit under O. 18 r. 19 of the Rules of the High Court 1980 ("RHC").

[2] The appellants' suit was struck out on two grounds. Firstly, for using the wrong mode of proceedings. Secondly, the suit was barred by limitation under s. 2(a) of the Public Authority Protection Act 1948 ("PAPA") and Sarawak Limitation Ordinance (Chap 49) ("SLO").

[3] The appellants are the plaintiffs and the respondents are the defendants. For convenience parties are to be referred to as in the High Court.

Background Facts

[4] The relevant background facts are these. The plaintiffs are Berawan by race and natives of Sarawak. They claimed that they had acquired native customary rights ("NCR") over three parcels of land which were shown in a map marked "M" annexed in the statement of claim ("NCR Land"). It was the plaintiffs' case that the NCR Land was owned and occupied by their grandparents in

A accordance with their custom. The complaint by the plaintiffs was that the Superintendent of Lands and Surveys Miri Division ("second defendant") and the State Government of Sarawak ("third defendant") had alienated and issued a provisional lease over part of their NCR Land to a company known as Boustead B Pelita Sdn Bhd ("first defendant") on a date unknown to them and without their knowledge. The plaintiffs contended that the issuance of the provisional lease by the second defendant and third defendant was unconstitutional and unlawful as it impaired their NCR over their land without first extinguishing their NCR C and ensuring that adequate compensation was provided for under the Land Code.

[5] The second defendant as well as the third defendant resisted the plaintiffs' claim. It is their pleaded defence that the plaintiffs D did not have any NCR and have not acquired any NCR within the area covered by the provisional lease to the first defendant. The second and third defendants also pleaded that the locality map marked "M" annexed to the plaintiffs' statement of claim was not an official map, which is inaccurate, therefore rendering it E inadmissible as evidence. By reason thereof, it is the second and third defendants bone of contention that the plaintiffs' claim against them was misconceived, frivolous, vexatious and an abuse of the process of the court. To this end, a notice was given by the defendants to the effect that their defence was filed without F prejudice to their right to make an application to strike out the plaintiffs' action against them.

[6] The first defendant did file their appearance. However, subsequent to this the first defendant filed an application (encl. 6) to strike out the plaintiffs' suit on the ground that it was G scandalous, frivolous or vexatious or was otherwise an abuse of the process of the court.

[7] The second and third defendants thereafter filed a similar application (encl. 7) to strike out the plaintiffs' suit. All the H defendants then applied to the learned High Court Judge to decide on the questions of law posed pursuant to O. 14A of the RHC, and, in the event the questions are determined in favour of the defendants then the plaintiffs' action be struck out under O. 18 r. 19 of the RHC. The questions posed were as follows:

I

(i) Whether the plaintiffs' challenge against the issuance of a provisional lease for Lot 8 Block 22 Tinjar Land District (formerly known as Lot 3 Block 22 Tinjar Land District) by the Superintendent of Lands and Surveys pursuant to powers under the Land Code ought to have been by way of judicial review and not by way of this present writ action; A B

(ii) Whether the plaintiffs' claims and the relief sought are barred by reason of the Limitation Ordinance of Sarawak (including items 72, 97, 110 and/or 112 of the Schedule thereto) and/or s. 2 of the Public Authorities Protection Act 1948; and C

(iii) Whether the first defendant's right, title and interest as registered proprietor of Lot 8 Block 22 Tinjar Land District (formerly known as Lot 3 Block 22 Tinjar Land District which is derived from Lot 23 Tinjar Land District and which Lot 23 is derived from Lot 12 Tinjar Land District) is indefeasible and free of the plaintiffs' claims of alleged native customary rights as pleaded in the statement of claim. D

[8] On the first question of law, the learned High Court Judge held that on the facts and circumstances of the case, the plaintiffs should have proceeded by way of judicial review under O. 53 of RHC to challenge the decision of the second defendant in issuing the provisional lease to the first defendant instead of by way of writ action. On the second question of law, the learned High Court Judge found that the plaintiffs' claim by writ action filed in 2011 was barred by reasons of the SLO and s. 2(a) of PAPA. As for the third question, the learned High Court Judge ruled based on another case he had previously decided that, in the event the plaintiffs have acquired NCR over the land; the first defendant's claim to indefeasibility of title by virtue of it being the registered owner cannot preclude the plaintiffs' claim to their NCR Land. E F G

[9] The plaintiffs' action was struck out under O. 18 r. 19 of RHC. Aggrieved by the High Court decision, the plaintiffs preferred an appeal to the Court of Appeal. H

Issues And Findings

[10] Before us, two main issues were canvassed by the parties, namely: I

A (a) whether the action should have been commenced by way of judicial review instead of a writ; and

(b) whether the plaintiffs' claim against the defendants was caught by limitation.

B We shall deal with the two issues in turn.

(a) Judicial Review Point

[11] In the present case, the learned High Court Judge found C that the impairment of the plaintiffs' NCR Lands by the issuance of the provisional lease by the second defendant to the first defendant under the Land Code lie in the realm of public law. Thus, His Lordship held that the plaintiffs should have proceeded by way of judicial review pursuant to O. 53 RHC to challenge the D decision of the second defendant instead of by way of writ action. The learned High Court Judge in so doing relied on the authorities of *Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor* [2004] 4 CLJ 775; *Jalang Paran & Anor v. Government of the State of Sarawak & Anor* [2011] 3 CLJ E 469; and *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145.

[12] The above mentioned authorities relied on by the learned High Court Judge were decided based on the authoritative F pronouncement of the House of Lords in *O'Reilly v. Mackman* [1982] 2 ALL ER 1124 (*O'Reilly*). We would like to state here that the case of *O'Reilly* has an important bearing in this appeal for the reasons we would state in the latter part of this judgment. Having said that, we do not propose to go into the details of the G said judgment, suffice to highlight the general principles which were propounded. The House of Lords in *O'Reilly* held that, as a general rule, a plaintiff who alleges infringement by a public authority of his rights must do so by way of judicial review as it is against public policy and an abuse of the courts process to H allow him to proceed by way of an ordinary action. Lord Diplock, MR laid emphasis for the aforesaid principle in his illuminating judgment which is reproduced as follows:

> ...it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to I permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection

> under public law to proceed by way of an ordinary action and by this means to evade the provisions of O. 53 for the protection of such authorities.
>
> Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis ...

[13] Clearly as can be seen from the above quoted passage, Lord Diplock in delivering the judgment of the court had laid down this principle to operate as a general rule only. His Lordship did not define the category of cases which fall within this general rule and acknowledged that there are certain exceptions to this rule. This was clearly reflected in the latter part of his judgment where His Lordship held that:

> ... I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.
>
> *... there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons.* (emphasis added)

[14] Based on the recognition given by Lord Diplock in *O'Reilly* that exceptions do exist to the general rule, the overriding question before us now in the present appeal at hand is whether the action filed by the plaintiffs being a NCR's claim fall squarely within this exception. Put simply, were the plaintiffs right in instituting this action by way of writ given that this is an action to challenge the decision of a public authority which is well within the domain of public law.

[15] A good guide for the courts to follow in ascertaining the proper mode of proceedings in public law matters can be seen in the Federal Court case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865. James Foong, FCJ held at p. 897:

> We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public

A law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action is under O. 53 is not suitable...Much depends on the facts of the case ...

[16] The above mentioned principle was reiterated but with an emphasis on NCR related cases in the Federal Court case of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766. Richard Malanjum, CJ (Sabah and Sarawak) in that case, by way of *obiter*, remarked the following:

I would like to make another note on the use of Order 53 RHC 1980 in cases involving native customary rights...With respect, I find that it is highly unfair and prejudicial to insists upon the natives to proceed by way of Order 53 when they seek to enforce a constitutional right by way of a declaration to that effect.

Although it does, to a certain extent fall within the realm of public law, I am of the view that it tilts more towards the vindication of a private right which is recognised both under statute and at common law (which pre-existed statute). As such, the natives should be at liberty to proceed by way of an ordinary civil suit. Another way of looking at it is to consider it as an exception to the *O'Reilly v. Mackman* [1982] 3 All ER 1124 principle.

[17] The view expressed by His Lordship Richard Malanjum, CJ (Sabah and Sarawak), *albeit obiter*, has an important bearing on how the courts should approach cases involving NCR claims. It is pertinent to note that in *Bato Bagi*, Richard Malanjum, CJ (Sabah and Sarawak) referred to and cited with approval the case of *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 (*Nikodemus Singai*). The facts of *Nikodemus Singai* are akin to the present case at hand wherein the plaintiffs in that case challenged the provisional lease granted by a public authority over areas of land the plaintiffs claimed they have native customary rights. The defendants challenged the action brought by the plaintiffs stating that the action should have been brought by way of judicial review instead of a writ action. Rodzariah Bujang, JC

(now High Court Judge) took pains to elucidate why cases of this genre (NCR) should be an exception to the *O'Reilly*'s principle. Her Ladyship Rodzariah Bujang had this to say:

> ... I am of the view that cases involving claims of native customary rights such as this one are an exception to the *O'Reilly*'s principle. I came to this conclusion because the prosecution of the plaintiff's right here is a genus in itself for by its very definition that right is largely unsupported by evidence; it is almost purely proved by oral evidence based on customs and tradition and is a peculiarity of only two states - Sabah and Sarawak. For the natives in these two state, - their rights to the land - to forage, to hunt, to fish and to cultivate the land, for it is not just a place to build a home but their very livelihood this right is handed down one generation to the next. To tie them down to the *O'Reilly*'s principle when more often than not they would only know about the transgressions of their right when the land had already been dealt with by the state authorities (as in this case) is an irreparable injustice which the Law Lords in *O'Reilly*, I am sure would never have intended.

[18] Justice Rodzariah Bujang, in her concluding remarks adopted Lord Scarman's words and stated that the private law element in the native customary rights claim is so great as to make it an exception to the general rule as postulated in *O'Reilly*. We agree with Her Ladyship's aforesaid views in *Nikodemus Singai*. We are of the same view that NCR related claims is not solely and/or exclusively within the domain of public law. It is a mixture of public and private law so to speak. Given that the private law element in NCR related claims is so great in that it affects the very livelihood of the natives of the state of Sarawak, we hold that the private law element is more dominant than the public law element attached to NCR claims. The peculiarity and distinct features of the NCR claims make it an exception to the general principle propounded in *O'Reilly*. Thus, we find that the plaintiffs were right in filing this action by way of a writ and not by way of judicial review under O. 53 of the RHC. In the result, we hold that the learned judge's finding on this point is, with respect, clearly misconceived.

Limitation Point

[19] The learned High Court Judge held that the plaintiffs' suit was statute barred as it was filed well outside the 36 months limitation period under s. 2 of the PAPA and the six years limitation period provided for under item 97 of the SLO.

[20] Learned counsel for the plaintiffs submitted that the issue of the limitation period under s. 2 of the PAPA and the SLO has no application since the plaintiffs' prayers were for declaratory orders. To support his argument, he relied on the decision of Court of Appeal and Federal Court in *Director of Forest Sarawak & Anor v. Balare Jabu & Ors And Another Appeal* [2012] 7 CLJ 685 (*Balare Jabu*) and the Federal Court case of *Teh Guan Teik v. Inspector General of Police & Anor* [1998] 3 CLJ 153; [1998] 3 MLJ 137 (*Teh Guan Teik*). Further thereto, learned counsel for the plaintiffs in relying on the case of *Balare Jabu* had submitted that the injury and damage to the plaintiffs is continuous and hence they fall squarely within the confines of the second limb to s. 2(a) of PAPA. Accordingly, the plaintiffs submitted that so long as the provisional lease remains valid, there is always a threat to the plaintiffs' NCR and their rights thereby entitling them to a valid cause of action. In short, the plaintiffs' stance is that the 36 months' limitation period for continuance of injury under s. 2 of the PAPA will only run when the said provisional lease becomes invalid being a continuing injury or damage upon the NCR and rights of the plaintiffs.

[21] We will first deal with the case of *Teh Guan Teik* cited and relied upon by learned counsel for the plaintiffs. In *Teh Guan Teik*, the question was whether the appellant (Teh) who was dismissed from his employment as a police sergeant could pursue the challenge on his dismissal *vide* a declaration when an action for *certiorari* was obviously out of time. Peh Swee Chin, FCJ had this to say:

> If the private citizen was not to be allowed to circumvent the limitations of time for applying, etc of the *certiorari* by claiming for declaration instead, it would not be difficult to imagine how many such citizens could be, due to lack of expertise in the law of *certiorari*, barred from seeking justice and the court would have failed to live up to the image the public has, of being an institution of the people to serve the people in the interest of justice.

[22] We have read the Federal Court judgment of *Teh Guan Teik* in great detail and with respect we find that the decision of the same cannot possibly lend any assistance in the contextual fact of the matter in issue. We say this as in *Teh Guan Teik*'s case the issue before the Federal Court was whether the appellant (Teh)

who was dismissed from his employment as a police sergeant could pursue the challenge on his dismissal *vide* a declaration when an action for *certiorari* was out of time. Further, we are of the view that with the recent Federal Court decision of *Ahmad Jefri*, the case of *Teh Guan Teik* can no longer be the correct position of the law.

[23] Thus what is left for us to consider is the case of *Balare Jabu*. The facts of *Balare Jabu* were these: The plaintiffs were claiming for numerous declaratory reliefs including a claim for NCR over an area of land in Kampong Long Lamai, Miri, Sarawak. The plaintiffs' grievance was against the issuance of a timber licence by the first and second defendant which they sought to declare as null and void in so far as it had impaired their NCR over their land. The defendants filed an application to strike out the plaintiffs' claim on the ground that limitation had set in pursuant to s. 2(a) of the PAPA and the Sarawak Land Ordinance. The learned High Court Judge in striking out the plaintiff's suit instituted in 2007 was of the considered view that the plaintiff had slept over their rights as the licence was granted way back in year 1992. They were said to be aware of the existence of the licence and the trespass into their alleged NCR land as early as 1995.

[24] The Court of Appeal reversed the High Court decision and took the view that although limitation may be a complete answer to a suit, action or proceeding for remedy, it is not an answer to a suit, action or proceeding for declaratory orders. Abdul Wahab Patail, JCA speaking for the Court of Appeal held that:

> [10] While limitation appears to be a complete answer to a suit, action or proceeding for remedy, it is no answer to a suit, action or proceeding for declaratory orders. A declaration whether the issuance of a licence is subject to native customary rights and whether the 2nd and 3rd respondents were in breach of a fiduciary duty pertaining to constitutional rights of the appellants, to know whether they have been wronged or not, is not purely academic. Even if it is without orders for compensation or damages, it serves the purpose of providing some solace to the appellants. And they have only their trust to rely upon that the government is committed to and will do what is right. We do not think such trust is misplaced for no legitimate government intends to act unfairly or unjustly per se or in breach of its subjects' constitutional rights. Injustice or unfairness happens only by mistake or unintended error which a true government will seek to remedy without the necessity of an order for compensation and damages.

[25] Aggrieved by the aforesaid decision the defendants appealed to the Federal Court. The sole question of law posed before the Federal Court was:

> Whether the defence of limitation under section 2 of the Public Authorities Protection Act 1948 and/or Sarawak Limitation Ordinance, is an answer to a suit, action, or proceedings for declaration or declaratory orders.

[26] The Federal Court in *Balare Jabu* in declining to answer the question of law posed was of the considered view that since the timber licence remains valid, it continues to be subjected to the plaintiffs' NCR. Accordingly the Federal Court decided that the second limb of s. 2(a) of PAPA applies, being a continuing injury or damage upon the NCR and rights of the plaintiffs. Hence, the Federal Court ruled that the plaintiffs' claim instituted in year 2007 was not caught by limitation. Accordingly the case was sent back for trial at the High Court. Richard Malanjum, CJ (Sabah and Sarawak) in delivering the judgment of the court had this to say:

> We do not think it can simply be said that the respondent's cause of action accrued on the date the license was granted in 1992 or even 1995 as found by the learned High Court Judge and thus falling within the first limb of s. 2(a) of PAPA. In our view, the second limb of the said section should apply, namely, being "the case of a continuance of injury or damage". The reason we say so is because based on the uncontroverted facts, in particular the fact that in the licence granted it is clearly stated that the date of issue is on 30 March 1992 while the date of expiry is on 29 March 2012. Therefore the license was still valid at the time the action was filed.
>
> We also noted that cl. 29(a) of the license clearly stipulated thus: This licence is granted without prejudice to the exercise of any right admitted or privilege conceded to the natives under the Forests Ordinance.
>
> As such we are of the view that as long as the licence remains valid, it continues to be subject to the respondents' NCR, if any, and rights in respect of the land concerned. Accordingly, the second limb of s. 2(a) PAPA applies, being a continuing injury or damage upon the NCR and rights of the respondents.

[27] Learned counsel for the plaintiffs in this case relying on the case of *Balare Jabu* had submitted before us that injury and damage to the plaintiffs herein is continuous and hence they fall squarely within the confines of the second limb to s. 2(a) of PAPA.

[28] We have deliberated on this issue and with respect we find that the case of *Balare Jabu* does not lend any credence to the plaintiffs' case. As found by the Federal Court in *Balare Jabu*, the plaintiffs' NCR was subjected to the timber licence which was issued to the defendants in that case. In *Balare Jabu* it was expressly stated in the timber licence itself at cl. 29(a), "**this licence is granted without prejudice to the exercise of any right admitted or privilege conceded to the natives under the Forest Ordinance**" (emphasis added). Thus, the Federal Court in *Balare Jabu* took cognizance of this and arrived at its decision as it did. However in the instant case, the provisional lease being issued in year 1992 lacks the backing of such provision as in *Balare Jabu*. Hence, we are constrained to agree with the plaintiffs' submission on this point, and we find the plaintiffs' reliance on *Balare Jabu* is misconceived.

[29] Having said the above, the issue now is whether the plaintiffs' suit against the defendants is statute barred, namely under s. 2(a) of PAPA and Item 97 of the SLO. To determine whether the plaintiffs' suit is time barred we must first ascertain the accrual of the cause of action which gave rise to the filing of the plaintiffs' suit against the defendants and the relevant time limit as mandated by the statute. In this regard we produce the relevant s. 2(a) of PAPA and Item 97 of the SLO for ease of reference.

Section 2(a) of PAPA provides that:

> Where, after coming unto force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, the following provisions shall have effect:

A (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

B Item 97 of the SLO, on the other hand, provides for the following:

97.	Suit for which no period of limitation is provided elsewhere in this Schedule	Six Years	When the right to sue accrues

C

[30] Under the aforesaid provisions as discussed above it is clear that s. 2(a) of PAPA provides for a limitation period of thirty six months from the date of the act, neglect or default complained of against the public authority. In the case of a continuous damage D or injury, the second limb to s. 2(a) becomes operational wherein the limitation period to bring an action against the public authority will be within thirty six months after the ceasing of the alleged neglect or default of the public authority. The limitation period mandated under Item 97 of the SLO to bring an action is six E years from the date the right to sue accrues.

[31] We shall first discuss the limitation issues pertaining to the second and third defendants. In discussing whether limitation has set in against the second and third defendants, we will have to F advert to the facts that gave rise to this suit.

[32] The pertinent undisputed facts of this case, which gave rise to this suit is thus:

G (i) in 1992 ie, about twenty years before the filing of the plaintiffs' writ herein, the second defendant exercising its power under the Land Code issued a provisional lease to the first defendant; and

(ii) as a result of the provisional lease being granted the said land H was alienated to the first defendant and the first defendant became the registered owner, thereafter the said land was developed into an oil palm estate wherein which the plantation was duly completed in year 1994.

I

[33] Against this backdrop the plaintiffs instituted an action against the defendants. The issue now is when the plaintiffs' cause of action accrued. Looking at the facts objectively it is safe to conclude that the plaintiffs' cause of action against the second and third defendants accrued after the issuance of the provisional lease in 1992. Given this scenario and premised on the thirty six months limitation provided under s. 2(a) of PAPA, there can be no doubt that the plaintiffs' action against the second and third defendants is time barred as the suit was brought nearly twenty years after the issuance of the provisional lease which is beyond the statutory timeline permitted.

[34] However on a different note, assuming there was indeed continuous injury and damage as the plaintiffs allege, can the plaintiffs rely on the second limb of s. 2(a) to defeat the issue of limitation? The way we perceive it, the answer to this question lies in the conduct of the plaintiffs on this matter. In this regard, it is undisputed that the plaintiffs took nearly twenty years to bring this action. This clearly shows that if they had any rights indeed, which has been infringed, and as a result thereof they have continued to suffer, an action should have been commenced promptly. However, the facts of this case certainly does not support the existence of a continuing injury or damage as whatever injury was caused by a single act of the second defendant in issuing the provisional lease some 20 years ago. During this time the first defendant managed to complete their oil palm plantation, and there were two compulsory land acquisition on two different occasions. The plaintiffs did not challenge these acquisition. As such the irresistible conclusion that can be drawn from this factual scenario is that whatever rights the plaintiffs have had been defeated as they had slept over it or acquiesced to the infringement of their rights. As rightfully pointed out by learned counsel for the second and third defendants since the plaintiffs did not take any action to protect their purported rights, it raises serious doubts on the *bona fides* of their NCR claim. Thus, in our judgment, having taken into account the facts and circumstances of the instance case, we find that the plaintiffs' claim against the second and the third defendants is hereby caught by limitation under s. 2(a) of PAPA.

[35] Insofar as the first defendant was concerned, as we have alluded to in the earlier part of this judgment the limitation period provided for under Item 97 of the SLO is six years. In this regard based on Item 97 of the SLO, we find that the plaintiffs' action which was instituted in year 2011 nearly eighteen years after the first defendant had finished the oil palm plantation is clearly out of time.

[36] In the same way, learned counsel for the first defendant also submitted that the plaintiffs' writ action filed against them in 2011 was barred by limitation by reasons as envisaged under Items 72, 110, 112 of the SLO. For the sake of clarity and reference we hereby reproduce the aforesaid Items under the SLO which states as follows:

72. To cancel or set aside an Instrument not otherwise provided for...	Three years	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.
110. For possession of immovable property, when the plaintiff while in possession of the property, has been dispossessed or has discontinued the possession	Twelve years	The date of the dispossession or discontinuance
112. For possession of immovable property or any interest therein not hereby otherwise specially provided for ...	Twelve Years	When the possession of the defendant becomes adverse to the plaintiff.

[37] Premised on the above, learned counsel for the first defendant submitted that the claim instituted by the plaintiffs is time barred under the aforesaid Items of the SLO. We have no hesitation in agreeing with the first defendant's contention on this point. Clearly, even looking at the other Items under the SLO

which is consonant with the issue of limitation and which is applicable to the instant case, we can safely conclude that the plaintiffs' action herein against the first defendant is also statute barred.

[38] Under these circumstances we find that the learned judge was right in striking out the writ of summons filed against the first, second and third defendants by reason that the plaintiffs' claim against them was statute barred under s. 2(a) of the PAPA and Item 97 of the SLO.

[39] For the reasons aforesaid, we dismiss this appeal and in the circumstances of this case, we order that each party to bear their own costs.